

***Office of Dispute Resolution for Acquisition***  
**Federal Aviation Administration**  
**Washington, D.C.**

<u>Protest of</u>	)	
	)	Docket Nos. 12-ODRA-
Diamond Antenna & Microwave Corporation	)	-00605 (EAJA) and
	)	-00617 (EAJA)
<u>Pursuant to Solicitation DTFAAC-12-R-03466</u>	)	

**FINDINGS AND RECOMMENDATION ON APPLICATION  
FOR ATTORNEYS' FEES  
UNDER THE EQUAL ACCESS TO JUSTICE ACT**

**I. INTRODUCTION**

This matter currently is before the Office of Dispute Resolution for Acquisition (“ODRA”) on an application (“Application”) by Diamond Antenna & Microwave Corporation (“Diamond”) for an award of attorneys’ fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (“EAJA”). The Application arises from two Diamond bid protests, i.e., Docket Numbers 12-ODRA-00605 and -00617 (hereinafter “Protests”), which challenged the Federal Aviation Administration (“FAA”) Mike Monroney Aeronautical Center’s (“Center”) intent to award a single source contract.

Following an unsuccessful attempt to resolve the Protests through use of alternative dispute resolution (“ADR”), the ODRA adjudicated the Protests and ultimately concluded that, “the Center’s single source decision to award a Contract for the Beacons and Receivers to [the Awardee] is not consistent with the FAA’s Acquisition Management System (“AMS”), is not properly supported by substantial evidence in the record, and therefore lacks a rational basis.” See *ODRA Findings and Recommendation* (“F&R”) at 2. In FAA Order Number ODRA-12-645, issued on December 5, 2012 (“Final Order”), the ODRA Director, acting pursuant to a

Delegation of Authority from the FAA Administrator,<sup>1</sup> adopted and incorporated the F&R as the final decision of the Agency in the Protests. No aspect of the Final Order was appealed.

For the reasons discussed herein, the ODRA recommends that the Diamond Application be granted in part and denied in part, and that the Center be ordered to compensate Diamond under the EAJA in the amount of \$20,553.74.

## **II. Factual Background**

The underlying Protests challenged the proposed award of a contract for 13 rotary joint L-Band Beacons (“Beacons”) and 13 rotary joint L-Band Receivers (“Receivers”) as used in the FAA’s Air Route Surveillance Radars (“ARSR-4”). The ARSR-4 “is used by the FAA and the U.S. Air Force to control airspace within and around the borders of the United States.” *Agency Response to Diamond Protest* (“AR”) at 4. The Protests alleged that the single source requirement was “unduly restrictive” and lacked a rational basis. *Diamond Protest* at 1.

The ODRA ultimately concluded that the Center’s single source decision to award a Contract for the Beacons and Receivers to a third party lacked a rational basis in that it was not consistent with the FAA’s Acquisition Management System (“AMS”) and was not properly supported by substantial evidence in the record. *See* F&R at 2.<sup>2</sup> In so finding, the ODRA noted that:

AMS Policy and Guidance require product teams to carefully analyze single source purchases. The justification, whether part of a broad procurement plan or a stand-alone document, must consider a range of relevant factors as applicable to the circumstances, including ways to “encourage competition as the preferred method of contracting.” *AMS Policy* 3.1.3. Mere unsupported conclusions lacking in adequate objective supporting data cannot properly support a single source award. *AMS Policy* 3.2.2.4.

F&R at 9. On the critical issue of ownership of data rights regarding the equipment, the ODRA found that:

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<sup>1</sup> *See* Delegation of Authority dated October 12, 2011.

<sup>2</sup> Familiarity with the F&R and Final Order in the Diamond Protests is assumed for purposes of this Decision.

[T]he AMS establishes higher standards than the minimal effort expended for this ground in the [Source Selection Justification]. While the Center indeed *might be correct* in its conclusions, it has failed to “document” the “adequate, objective supporting data,” as required by the AMS Policy 3.2.2.4. In particular, it has not included a supported discussion of “patents, proprietary data, copyrights or other such limitations.” *AMS Guidance* T3.2.2.4, Appendix 1. It has not considered or documented “whether the vendor will provide any data, specifications, [or] drawings ... to the FAA.” *Id.*

*Id.* at 10.

The ODRA F&R also found deficiencies in the Market Survey:

The Market Survey effectively proscribes potential competitors from demonstrating that they have *other* legal rights, knowledge, ability, time, or competitive pricing to deliver the item. As phrased, the Market Survey fails to support the SSJ because it does not – and cannot – “provide[] factual data to form conclusions and verify assumptions that FAA’s technical and business interests are best served through a single source.” *AMS Procurement Guidance* T3.2.2.4.A.(2)(a). Here, as in the SSJ itself, the Center assumed without support that [the third party] had proprietary rights.

*Id.* at 11. Similarly, the ODRA rejected, as unsupported in the record, assertions that re-engineering replacement parts would be too expensive and time-consuming and that “continuing with [the third party’s] rotary couplers enforces configuration management.” *Id.* at 12,13.

In the Conclusion of the F&R, the ODRA stated:

[T]his acquisition is one in a string of related acquisitions with [the third party] dating to at least 2003. FF 15. In such circumstances, a procurement plan or similar systematic documentation addressing the lifecycle management of the ARSR-4 system rather than a stand-alone, single source justification would be appropriate. *See* AMS Policy 3.2.1.2. and AMS Guidance T.3.2.2.4.A.1(b). Such documentation is not in the record, and the ODRA must conclude that the Center has failed to give “consideration ... to methods of maintaining competition throughout the lifecycle of [the] product or service.” AMS Policy 3.2.1.3.6. **In effect, the Center has created a perpetual, non-competitive single source acquisition plan for these components.**

*Id.* at 14. (emphasis added). Based on this conclusion, the ODRA recommended that the Protests be sustained and that “the Center be directed to not make award under the Solicitation at issue, and make any future award for the Beacons and Receivers in a manner consistent with the AMS and these Findings and Recommendations.” *Id.* at 15.

On March 5, 2013, Diamond filed the instant EAJA Application, which alleges that it is an eligible prevailing party and that the Center’s actions were not substantially justified. Diamond seeks reimbursement under EAJA in the amount of \$83,497.30. In accordance with FAA policy and pursuant to the FAA EAJA Regulations at 14 C.F.R. Part 14, the parties engaged in ADR to attempt to resolve the Application. That attempt also was not successful. On August 8, 2013, Diamond filed a supplement (“Supplement”) to the Application. The Diamond Supplement provided additional documentation in support of the Net Worth Exhibit included in the Diamond Application.

The Center thereafter filed its response to the Diamond Application and Supplement on or about August 14, 2013 (“Center Response”). The Center Response does not dispute that Diamond timely filed its EAJA Application with respect to the Protests. *See Center Response* (“CR”) at 11. The Center vigorously contends, however that: (1) Diamond is not an eligible, prevailing party within the meaning of the EAJA, *Id.* at 2-5, 6-8; (2) the Government’s position was “substantially justified” as a matter of fact and law, *Id.* at 8,9; (3) special circumstances exist here that would make an award unjust, *Id.* at 9-11; and (4) the fees and costs claimed by Diamond are, in whole or in part, not recoverable under the EAJA, *Id.* at 11-17.<sup>3</sup> On September 5, 2013, Diamond filed a Reply (“Diamond Reply”) to the Center Response. The Diamond Reply provided arguments in support of the Application as well as exhibits directed at the eligibility of Diamond for an EAJA award and the allowability of the costs claimed. *See Diamond Reply* and Exhibits 1-6 thereto.

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<sup>3</sup> In this regard, the Center’s Response to the EAJA Application disputes, among other things, the recoverability of: fees that are expressly identified as relating to alternative dispute resolution (“ADR”) as opposed to the adjudication phase of the Protest; fees incurred prior to the filing of the Protests; fees that exceed the billing rate of \$125 per hour; and the costs of participation of Diamond personnel in the Protests.

### **III. Discussion**

It is well established that the EAJA is applicable to adjudications at the ODRA. *See*, Public Law 108-176. Section 224(b)(4) expressly provides that ODRA adjudications are subject to Section 504 of Title IV, *i.e.*, the EAJA Statute. The FAA’s EAJA Regulations also expressly apply to ODRA adjudications. *See* 14 C.F.R. §§ 14.02(a), 14.21, 14.27(b), 14.28 b. *See Findings regarding Equal Access to Justice Act Application of Weather Experts, Inc.*, 96-ODRA-00013 EAJA; *Findings regarding Equal Access to Justice Act Application of IBEX Group, Inc.*, 02-ODRA-00254 EAJA; *Findings regarding Equal Access to Justice Act Application of Ridge Contracting, Inc.*, 04-ODRA-00312 EAJA. Finally, the FAA Administrator has delegated final decision authority in all EAJA adjudications to the ODRA Director. *See* Delegation of Authority dated October 12, 2011.

An applicant for an EAJA award is required initially to: (1) demonstrate that it is an eligible, prevailing party within the meaning of the EAJA Statute; (2) provide evidence supporting the allowability and reasonableness of the fees and expenses it is claiming; and (3) allege that the Agency’s position was not substantially justified. *Equal Access to Justice Act Application of IBEX Group, Inc., supra*. Once the EAJA applicant’s initial showing has been made, the burden shifts to the Government to challenge the Application and to demonstrate that the Government’s actions were substantially justified in fact and in law or that “special circumstances “ exist that would render an award unjust. *Id.*

#### **A. Diamond is an Eligible, Prevailing Party**

The issue of whether Diamond is “eligible” for an award under the EAJA has been hotly contested by the parties. The Center Response raises questions and suspicions regarding the materials supporting the Diamond Application. *See CR* at 4, 5. Among these are questions regarding the net worth of companies allegedly related to Diamond; missing or incomplete net

worth information regarding Diamond itself; and the lack of certifications of the financial records supplied with the Application. *Id.*

Diamond submitted additional supporting documentation in its Reply to the Center Response, including sworn affidavits by Diamond's Chairman and Chief Executive Officer and others, as well as other business records that appear to confirm that at all material times Diamond and all its affiliated companies had a combined net worth of less than \$7 Million.<sup>4</sup> *See Reply* at Exhibits 1-5. The ODRA concludes that a preponderance of the evidence supports the conclusion that Diamond is an eligible party within the meaning of the EAJA.

The EAJA does not define the term "prevailing party." The Supreme Court, however, held in *Texas State Teachers Ass'n v. Garland Independent School District*, that "[p]laintiffs may be considered 'prevailing parties' for attorney's fee purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." 489 U.S. 782, 789 (1989), *quoting Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Notwithstanding the Center's arguments to the contrary, and notwithstanding the contention that "Diamond did not receive a remedy that materially changed the legal relationship between the parties," *CR* at 8, Diamond succeeded in obtaining an FAA Administrator's Order that sustained its Protest and Directed that the Center "not make award under the Solicitation at issue, and make any future award for the [equipment involved] in a manner consistent with the AMS and these Findings and Recommendations." Thus, Diamond must be considered a "prevailing party" for purposes of the EAJA, since it achieved a significant benefit sought in the litigation, i.e., preventing a planned single source award that would have deprived it of any possible opportunity to compete for the contract.<sup>5</sup>

## **B. The Position of the Center was not Substantially Justified**

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<sup>4</sup> The ODRA notes that applications such as Diamond's are subject to, among other things, the False Claims Act, 31 U.S.C. § 3729.

<sup>5</sup> It must be remembered that this EAJA Application arises from a bid protest, not a contract or other dispute. Were the ODRA to adopt the Center's argument, a successful protester, would only be a prevailing party if it obtained the remedy of a directed award, which is a relatively rare occurrence. The ODRA finds no basis for such a narrow reading of the remedial intent of the EAJA statute.

Diamond's Application cites to the ODRA's F&R in asserting that the Center's position was without substantial justification, as follows:

The ODRA in this protest determined that the Center's SSJ was insufficient to satisfy requirements in the AMS detailed policy and guidance regarding how to support a single source decision. ODRA Facts and Findings, Ex. 2 at 9. Although the Center had provided three specific grounds to support the intended single source purchase from [the third party], the ODRA found that each ground lacked adequate, objective supporting data. *Id.* There was no documentation supporting the Center's assertion that [the third party] had proprietary data rights for the design and fabrication of the beacons and receivers. *Id.* at 10-12. The Center had provided no citations or attachments to support its claim that the cost and time associated with re-engineering, designing and prototype testing of new replacement critical parts would not be cost effective nor meet mission requirements without causing excessive delay to the program. *Id.* at 12-13. Finally, the Center provided none of the analysis required by the AMS guidance to support its assertion that continuing to use [the third party's] rotary couplers would enforce configuration management and thus standardization. *Id.* at 13-14.

*See Diamond Application* at 4.

For its part, the Center contends that its position was substantially justified because “the Agency relied on case precedence established in Diamond I, ODRA Docket 11-ODRA-00583.” *See CR* at 9. The Center notes in that regard that “case precedence has been established in the review of nearly identical Market surveys and Single Source Justifications...” in the referenced earlier Diamond Protest. *Id.* The Center's position ignores the well-established principle that each single source acquisition must be evaluated on its own merits. As we stated in the referenced earlier Diamond Protest Decision, quoting from the AMS:

‘Each single source decision stands alone and is based on the circumstances.’  
*AMS Procurement Guidance: A: Single Source Contracting (Added 10/2006): 1: Basis for Single Source (Revised 1/2010)*. The rational basis for any decision to enter into a single source contract will be subject to close scrutiny by the ODRA. *Protest of J&J Electronic Systems*, 05-ODRA-00340.

*Protest of Diamond Antenna and Microwave Corporation*, 11-ODRA-00583. Moreover, unlike in the instant Protests, the ODRA found in the earlier Diamond Protest that:

Diamond has not met its burden to demonstrate that the Center's single source award for a Rotary Coupler lacks a rational basis or was otherwise arbitrary, capricious, or an abuse of discretion. Diamond's attempt to submit required supporting information after the award decision, and during the course of the Protest proceedings, cannot provide a basis for attacking the award.

*Id.* at 9. Finally, the ODRA also specifically noted in the earlier Diamond Protest Decision that "nothing in these Findings and Recommendations should be construed as authorizing any future single source awards by the Center of rotary couplers or related equipment." *Protest of Diamond Antenna and Microwave Corporation, supra* at fn.6.

In EAJA situations, the ODRA looks at the entirety of the Government's conduct, as reflected by the administrative record, and "the actions and positions taken by FAA contracting officials must be judged not by twenty/twenty hindsight but, rather by the policy guidance available to them at the *relevant time*." See *Recommendations of the ODRA on Application of Camber Corporation under the Equal Access to Justice Act*, ODRA Docket No. 98-ODRA-00102, *quoting from Camber Corporation*, 98-ODRA-00079 EAJA at 4 (emphasis added). In this case, as is demonstrated in the F&R, there was ample AMS policy guidance available to the Center at the time the single source decision was made and thereafter. The Center failed to act in accordance with that AMS guidance and the ODRA concludes that the Region's actions were not justified "in the main" and thus were not substantially justified in law or in fact for EAJA purposes. *Pierce v. Underwood*, 487 U.S. 552 (1988).

### **C. A Portion of the Fees Claimed are Allowable Under EAJA and Reasonable**

The Diamond Application ("Application") seeks to recover a total of \$83,497.30. *Diamond Application, Exhibit 4*. This amount is comprised of:

Outside counsel fees and expenses at four law firms as follows:

Fluet Huber & Hoang	\$25,620.14
Smith Pachter McWhorter	\$4,560.72
Offit Kurman	\$ 1,629.51
Shulman Rogers	\$ <u>6,386.93</u>



Sub-Total: \$38,197.30

Costs of Participation  
of Diamond Personnel: \$45,300.00

Total claimed: \$83,497.30

*Id.*

The Center objects to the amounts claimed on several grounds. *See CR* at 12-17. These include: fees incurred in connection with litigation other than ODRA Case Numbers 13-ODRA-00605 and -00617; fees incurred in connection with ADR efforts; fees and expenses that exceed a rate of \$125.00 per hour; and most particularly, \$45,300.00 claimed for costs associated with participation of Diamond personnel. *Id.* Thus, while not conceding that Diamond is entitled to an EAJA award in any amount, the Center contends that based on the objections it has raised, Diamond should be awarded no more than \$16,391.25. *CR* at 17. Diamond contends, without waiving its original Application amount, that if all of the Center's objections are adopted by the ODRA, the award amount should be \$23,656.25. *Diamond Reply* at 7.

Diamond concedes that a portion of the fees claimed were incurred in connection with matters other than 13-ODRA-00605 and -00617. *Diamond Reply* at 4, 5. Such costs are not allowable through the pending Diamond Application, which is grounded solely on Diamond's status as an eligible, prevailing party in the instant Protests. Similarly, Diamond concedes that a portion of the fees claimed were incurred in connection with ADR efforts. *Diamond Reply supra* at 4, 5. It is well established in ODRA case law that ADR-related fees generally are not recoverable under the EAJA. *See Findings regarding Equal Access to Justice Act Application of IBEX, Group, Inc., supra.*

The Center also contends, citing to 14 C.F.R. §14.05 (e), that Diamond cannot recover costs it incurred prior to the filing of the Protests. *See Center Response* at 12, 13. The portion of 14 C.F.R. § 14.05 (e) referred to by the Center applies to the "issuance of a complaint" by the Agency against private parties in non-ODRA proceedings. Costs incurred in preparing to file an

ODRA case are viewed by the ODRA as a necessary part of “the Adjudicative Process for a protest or contract dispute under part 17 of this chapter and the AMS”, and therefore are recoverable under 14 C.F.R. § 14.05 (e).

Diamond also contends that it should be permitted to recover its internal costs because, “without the basic work done by Diamond Antenna personnel there would have been no decision to sustain the protests.” *Diamond Reply supra* at 6. While that may be the case, EAJA case law clearly recognizes that such in-house costs are not recoverable under the Statute. *See Fanning, Phillips, Molnar v. West*, 160 F.3d 717 (Fed. Cir. 1998); *Kuzma v. United States*, 725 F.2d 16 (2nd Cir. 1984).

Finally, with respect to allowability of the hourly rates charged, the FAA EAJA Regulation at 14 C.F.R. § 14.05 (b) provides that “[n]o award for the fee of an attorney or agent under this part may exceed \$125 per hour, or such rate as prescribed by 5 U.S.C. § 504.” In arguing for an adjustment that would allow for recovery at a higher hourly rate, Diamond counsel cites to several decisions based on the EAJA provisions applicable to courts that are found at 28 U.S.C. § 2412. *Diamond Application* at 6-8. Diamond cites no authority that would permit such an adjustment pursuant to 5 U.S.C. 504 or 14 C.F.R. § 14.05. In fact, unlike a court, an administrative forum such as the ODRA cannot make an award above the \$125 per hour limit in the absence of express authority to do so. *See TST Tallahassee, LLC v. Department of Veterans Affairs*, CBCA No. 2472-C (1576), 12-1 BCA ¶ 35037. It must be remembered in that regard that the EAJA attorney fee provision constitutes a waiver of sovereign immunity and must be strictly construed in favor of the Government. *Escobar v. United States Immigration and Naturalization Service*, 935 F.2d 650 (4<sup>th</sup> Cir. 1991). The ODRA finds no legal basis for an award that exceeds the statutory and regulatory cap.

Both sides are in agreement that application of the \$125 maximum hourly rate cap to the Application would reduce the total amount claimed to \$71,819.15. *CR* at 17; *Diamond Reply* at 7. The ODRA adopts the parties’ figure of \$71,819.15 as the starting point for calculating the

amount that should be awarded to Diamond. The ODRA also concludes, however, based on the above, that the amount claimed must be further adjusted as follows:

Starting Figure applying \$125/Hr. EAJA Cap		\$71,819.15
Less Unrecoverable Expenses:		
Participation by Diamond Personnel <sup>6</sup>	\$43,300.00	
Smith, Pachter, McWhorter <sup>7</sup>	3,102.90	
Fluet, Huber & Hoang <sup>8</sup>	2,312.51	
ADR Efforts of Shulman, Rogers, et al. <sup>9</sup>	<u>550.00</u>	
Total Deduction		<u>(51,265.41)</u>
Net Amount of EAJA Award		\$20,553.74

The ODRA concludes that the Net Amount of \$20, 553.74 is reasonable and represents allowable fees and expenses recoverable under the EAJA in connection with the adjudication of the instant Protests (13-ODRA-00605 and -00617).

#### **D. There are no Special Circumstances that would Render an Award Unjust**

The Center asserts that special circumstances exist in this case that should preclude an EAJA award. *See Center Response* at 9, 10. The Center points to the age of the ARSR-4 system and the fact that it was procured long before the requirements of the AMS regarding lifecycle planning were in place. *Id.* The Center's assertions undoubtedly are factually accurate. It also is true, however, that according to the Center, even at the time the ARSR-4 system was acquired, steps could and should have been taken to secure available specifications and drawings for the Agency to enable it to procure replacement parts. *CR* at 10. While the Center took the position that the information is proprietary to a third party, as was noted in the F&R, "[n]o documentation for this proposition is referenced or attached to the SSJ. The nature of the 'proprietary data rights' is not described and the basis for this conclusion is not provided." *F&R* at 10.

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<sup>6</sup> Non-recoverable in-house costs. *See Discussion, supra.*

<sup>7</sup> Diamond has conceded that these fees were incurred in connection with an earlier protest. *Diamond Reply* at 4.

<sup>8</sup> This reflects deletion of fees incurred in other protests and apportionment of fees on the basis set forth in the *Diamond Reply*. *Diamond Reply* at 5, Exhibit 6.

<sup>9</sup> Between May 8 and May16, 2012: 4.4 hours of ADR-related activity x \$125/hr. = \$550.

As we noted in *Findings in Equal Access to Justice Act Application of IBEX Group, Inc., supra.*, the “special circumstances” exception is applied only rarely to deny the recovery of attorneys’ fees under the EAJA. *Id.* at 9. “This ‘safety valve’ helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts.” *Id.*, quoting *Dougherty v. Lehman*, 711 F.2d 555, 563 (3d Cir. 1983), quoting, H.R. No. 1418, 96th Cong. 2d Sess., at 10-11, reprinted in 1980 U.S. Code Cong. & Ad. News, at 4989-90. The ODRA finds no special circumstances present here that would render an award unjust.

#### **IV. Conclusion**

The ODRA finds that Diamond is an eligible, prevailing party within the meaning of the EAJA Statute. The ODRA further concludes that the Center’s actions were without a substantial justification in law and fact and that no special circumstances exist that would render an award unjust. The ODRA also concludes, however, that a portion of the fees claimed are not recoverable under the EAJA for the reasons discussed above. The ODRA therefore recommends that the Center be ordered to reimburse Diamond pursuant to the Equal Access to Justice Act in the amount of \$20,553.74 in accordance with 14 C.F.R § 14.30.

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Anthony N. Palladino  
Director and Administrative Judge,  
FAA Office of Dispute Resolution  
for Acquisition